AZHAR HARUN v. DATO' MUTHUKUMAR AYARPADDE & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD FAIRUZ ZAINOL ABIDIN J
[SUIT NO: WA-22NCC-188-05-2020]
22 SEPTEMBER 2021

Abstract – *If there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 2 rather than going under O. 18 r. 19 of the Rules of Court 2012. An action may involve many disputes on the facts as well as on the law; some more complex than the others. The determination of a preliminary point in one way may make it unnecessary for other more complex issues of fact or law to be decided, thus resulting in a saving of time and expense of a protracted trial on those issues.*

CIVIL PROCEDURE: *Pleadings – Statement of claim – Determination of questions and issues – Rules of Court 2012, O. 33 rr. 2 & 5 – Plaintiff filed suit premised on breach of contract and fraudulent trading – Whether plaintiff's statement of claim disclosed any valid cause of action against defendants – Whether plaintiff pleaded necessary elements in statement of claim to make out cause of action for fraudulent trading – Whether there existed any privity of contract between parties – Whether there was any actionable misrepresentation – Whether there was point of law which required serious discussion – Whether objection should be taken on pleadings and point set down for argument*

The plaintiff filed the present suit against the defendants premised on two causes of action, breach of contract and fraudulent trading. The plaintiff's case was that (i) due to his expertise as a 'turnaround specialist', he was asked to join the first defendant's group of companies which included, among others, the third to tenth defendants; (ii) he was induced to join the first defendant as the Chief Executive Officer ('CEO') upon being convinced by the representations which related to the performance of the companies under the control of the first defendant; (iii) his employment contract contained, among others, a term which read 'Other than your Key Performance Index (KPI) that shall be agreed upon annually, your goal is to achieve a quadrupling the total sum of the audited profit before tax (PBT) of all the companies in 2010 at the fifth year of your tenure as a group CEO ('target'); (iv) the representations were fraudulent in that the audited financial statements were manipulated and falsified. He would not have entered into the employment contract ('misrepresentations'); (v) upon joining the group, the plaintiff found that the financials of the third to tenth defendants were not as what was represented to him; (vi) as a result of the misrepresentation, he was unable to perform and meet the target; (vii) he had performed his part

of the bargain not by meeting the target set (to turnaround the companies and quadruple the PBT) but by making the MK Group of companies 'less loss-making; (viii) the plaintiff was then wrongfully terminated from his position and he claimed that he was entitled to all benefits outlined under the employment contract. The third to tenth defendants subsequently filed an application for a determination of questions and issues pursuant to O. 33 r. 2 of the Rules of Court 2012 ('ROC') ('encl. 28'). The questions to be determined by the court were: (i) whether the plaintiff's statement of claim ('SOC') disclosed any valid causes of action against the third to tenth defendants ('question 1'); (ii) whether the plaintiff had pleaded the necessary elements in the SOC to make out a cause of action for fraudulent trading ('question 2'); (iii) whether there existed any privity of contract between the plaintiff and the third to tenth defendants ('question 3'); and (iv) whether there was any actionable misrepresentation made by the third to tenth defendants as pleaded by the plaintiff ('question 4'). The plaintiff raised a preliminary objection against encl. 28 and submitted that encl. 28 was (i) a procedural manoeuver to delay the trial of the action as long as possible and was an abuse of the process of the court; (ii) oppressive, improper and unreasonable and ought to be dismissed with costs on indemnity basis and to be paid forthwith; and (iii) the present case was not suitable for disposal under O. 33 of the ROC even on the merits of encl. 28.

Held (allowing encl. 28):

(1) If there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 2 rather than going under O. 18 r. 19 of the ROC. That was precisely what the third to tenth defendants sought to do. The objection raised by the plaintiff was unsupported in law. Order 33 of the ROC itself does not dictate any procedural requirement, let alone any two-stage process. It was purely an enabling provision, allowing the court the discretion to deal with the preliminary issue, depending on the nature of the case. In the current case, the questions posed did not require any further invention or direction by this court. They were valid questions which this court could determine based on the parameters set out under O. 33 of the ROC. (paras 32 & 34-35 & 36)

(2) There seemed to be an approbation and reprobation on the part of the plaintiff. The plaintiff pleaded misrepresentation. Misrepresentation affects the free consent necessary to form a contract. The effect is to render the contract voidable. The option is on the plaintiff as to whether to treat the contract as valid or rescind it. However, despite the plaintiff claiming that he got to know about the falsity of the financial standing of the group of companies as early as April 2011, he did nothing until his termination in 2015. This could only mean

that the plaintiff did not find the alleged misrepresentation objectionable then. However, more than four years after his termination, the plaintiff sought to argue that there was misrepresentation but he was not seeking a remedy under misrepresentation but one under a breach of contract. The misrepresentation was the foundation that he laid his claim for a cause of action under a breach of contract. (paras 64-66)

(3) The plaintiff clearly elected to affirm the employment contract as he did not choose to rescind the same. However, he now wished to resurrect the misrepresentation made against him as the foundation of his breach of contract claim. This was where the plaintiff failed in resisting the third to tenth defendants' application. The plaintiff could not now find a case for damages for breach of contract on allegations that are anchored on misrepresentations. The issue of lack of free consent is spent. He was estopped by way of conduct from raising misrepresentation once he affirmed the contract. This was where he approbated and reprobated. It was clear that the plaintiff had taken benefit from the course of conduct that he pursued while under the employment contract but now takes an inconsistent stand to his earlier position. (paras 67-69)

(4) A breach of contract would entitle the innocent party to bring the contract to an end and claim for damages. This is provided so in s. 40 of the Contracts Act 1950. Damages must be in relation to and flow from the breach *ie*, after the contract is formed. It could not be rooted in the alleged misrepresentation prior to the contract being formed. The plaintiff was not entitled to be awarded damages both for misrepresentation and breach of contract. (paras 71 & 72)

(5) The representations that the plaintiff claimed to have induced him to enter the employment contract were not actionable representations. They were largely based on audited financial statements which have been audited and approved by auditors. The plaintiff did nothing to apply for any restatement of the accounts and neither did he call for a new audit exercise to be undertaken then. (paras 76 & 77)

(6) Frustration of contracts refer to a particular way in which contractual obligations could be discharged. A contract is frustrated where further performance of the contract becomes impossible due to an unforeseen event or series of events taking place through no fault of the parties to the agreement. In these circumstances, the parties contractual obligations are automatically discharged and subsequently, neither party could demand further performance of the contract by the other party. It could not be any change in circumstances would result in frustration of a contract. It must be fundamental enough to transmute an obligation which the contract did not contemplate and to which it could not apply. (paras 79 & 80)

(7) No cause of action could be founded against the third to tenth defendants as a result of the purported misrepresentation and breach of contract. As such, question 1 was answered in the negative. (para 86)

(8) The plaintiff failed to plead how each of the defendants carried out their respective business so as to defraud the plaintiff for a fraudulent purpose. Nothing was found in the SOC to allow this court to ascertain the factual manner in which fraudulent trading was carried out. Question 2 was answered in the negative. (paras 90 & 97)

(9) Based on the SOC, the plaintiff anchored his claim to the benefits and entitlement under the employment contract and the service agreement. However, the third to tenth defendants are not parties to the agreements. By this token alone, there was an apparent disconnect when viewed from the privity angle. There was no link between the plaintiff and the third to tenth defendants. What the plaintiff sought to do was to link the acts of the first defendant to the third to tenth defendants using the reversal of the *alter ego* doctrine. There was no requirement to do so as, clearly, the directing hand and mind of the companies was the first defendant himself. What was being attempted by the plaintiff was in effect an imputation of privity into the third to tenth defendants when it could not arise in the first place. Question 3 must be answered in the negative. (paras 100-102)

(10) As could be seen in the SOC, the plaintiff pleaded that there was misrepresentation made by the defendant. The said misrepresentations spanned over many paragraphs of the SOC. Although the plaintiff insisted in no uncertain terms that he grounded his cause of action on a breach of contract, the manner he pleaded the misrepresentations made it inextricable to his pleaded case. It was in fact the foundation which formed the catalyst of his claim. The effect of the plaintiff disclaiming any reliance of misrepresentation simply meant that there was no actionable misrepresentation made out against the third to tenth defendants. The consequence of such a stand precluded the plaintiff from relying on the consequences of misrepresentation namely frustration. It also precluded him from relying on the contention that he was entitled to the substitution of the original target with the implied terms. Question 4 must be answered in the negative. (paras 103-106)

(11) Enclosure 28 was decisive as far as the litigation against the third to tenth defendants were concerned. Although the plaintiff had pleaded his best case against the third to tenth defendants, they contained facts which did not reveal a cause of action against them. This was an appropriate case for the court to apply the provisions of O. 33 r. 2 read together with r. 5 of the ROC. The cases against the third to tenth defendants were dismissed. (paras 110, 112 & 113)

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Bounty Dynamics Sdn Bhd v. Chow Tat Ming & Ors [2015] 9 CLJ 422 CA ***(refd)***

Boustead Naval Shipyard Sdn Bhd v. Dynaforce Corporation Sdn Bhd [2014] 5 CLJ 533 CA ***(refd)***

Chendeladevan Kuppusamy v. Majlis Bandaraya Pulau Pinang [2021] 1 LNS 50 HC ***(refd)***

Dato' Prem Krishna Sahgal v. Muniandy Nadasan & Ors [2017] 10 CLJ 385 FC ***(refd)***

Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd (Originating Summons No: WA-24NCC-392-08-2018) (Unreported) ***(refd)***

Deepak Jaikishan Jaikishan Rewachand & Ors v. Dato' Seri Mohd Najib Tun Abdul Razak & Ors [2020] 1 LNS 1008 HC ***(refd)***

Formis Resources Bhd & Ors v. Risk Management And Safety System Pty Ltd & Ors And Other Appeals [2016] 9 CLJ 169 CA ***(refd)***

Konsortium Lebuhraya Utara-Timur (KL) Sdn Bhd v. Liew Choong Kin [2018] 6 CLJ 217 CA ***(refd)***

Low Keang Guan v. Sin Heap Lee-Marubeni Sdn Bhd [2005] 1 LNS 289 HC ***(refd)***

Newacres Sdn Bhd v. Sri Alam Sdn Bhd [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321 SC ***(refd)***

Parkinson (Sir Lindsay) & Co Ltd v. Commissioner of Works [1949] 2 KB 632 ***(refd)***

Pemilik-Pemilik Dan/Atau Pencarter-Pencarter Demis Tongkang Atau Vesel "Wantas 17" v. Pemilik-Pemilik Kapal Atau Vesel "My Ferry 2" [2021] 1 LNS 666 CA ***(refd)***

Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal [2003] 4 CLJ 337 CA ***(refd)***

Ramli Zakaria & Ors v. The Government Of Malaysia [1983] 1 CLJ 73; [1983] CLJ (Rep) 350 FC ***(refd)***

Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 CLJ 1 FC ***(refd)***

Spacious Glory Sdn Bhd v. Coconut Three Sdn Bhd [2020] 1 LNS 1617 HC ***(refd)***

Taylor v. Caldwell (1863) 3 B & S 826 HC ***(refd)***

Tradewinds Properties Sdn Bhd v. Zulhkiple A Bakar & Ors [2019] 2 CLJ 261 CA ***(refd)***

Legislation referred to:

Companies Act 1965 (repealed), s. 304(1)

Companies Act 2016, s. 540(1)

Contracts Act 1950, s. 40

Rules of Court 2012, O. 18 r. 19, O. 33 rr. 2, 5

For the plaintiff - Mubashir Mansor, Amir Feisal Ariff, Raja Nadhil Aqran; M/s Ariff & Assocs

For 1st & 2nd defendants - Prem Ramachandran & Saresh Mahendran; M/s Kumar Partnership

For the 3rd-10th defendants - David Mathews & Ng Ken Yong; M/s Mathews Hun Lachimanan

Reported by Lina E

A

JUDGMENT

Ahmad Fairuz Zainol Abidin J:

Introduction

B **[1]** The plaintiff in this action filed the present suit against the defendants on 18 May 2020 premised on two causes of actions, breach of contract and fraudulent trading.

[2] The third to tenth defendants subsequently filed an application for a determination of questions and issues pursuant to O. 33 r. 2 Rules of Court 2012 ("ROC 2012") as documented in encl. 28. The plaintiff raised a C preliminary objection against the third to tenth defendants' application.

[3] At the conclusion of the hearing, this court allowed the third to tenth defendants' application. This is the grounds of decision of this court.

Background

D

The Plaintiff's Case

[4] The plaintiff claimed that due to his expertise as a "turnaround specialist" he was asked to join the first defendant's group of companies. The companies among others, included the third to the tenth defendants. The E plaintiff contended that he was induced to join the first defendant as the chief executive officer ("CEO") upon being convinced by representations (as outlined below) which relate to the performance of the companies under the control of the first defendant. His employment contract, contained among others, a term which read "other than your key performance index (KPI) that F shall be agreed upon annually, your goal is to achieve a quadrupling the total sum of the audited profit before tax (PBT) of all the companies in 2010 at the fifth year of your tenure as a group CEO" (the "target").

The Representations

[5] The representations that the plaintiff claimed to be made to him were: G

The First Representation (*via* e-mail dated 9 September 2010):

(i) in respect of the projected Profit After Tax ("PAT") for the third defendant ("IBI SB"), the fourth defendant ("MAA SB"), the fifth defendant ("DDC SB"), Castwel Autoparts Private Limited H ("Castwel"), Sathya Auto Private Limited ("Sathya") and UMW Dongshin Motech Private Limited ("UMW Dongshin") from 2010 to 2014. Castwel, Sathya and UMW Dongshin are Indian companies in which the first defendant owns substantial shareholdings and management control; and

I (ii) the tabulated group profit trend, projected for the years 2010 to 2014 for all the Malaysian companies and the Indian companies. 1% of the first defendant's investments in the relevant companies was worth RM5,633,045.

The Second Representation:

(iii) on or about 3 December 2010 and 4 December 2010, the plaintiff was given the statutory financial statements for 2007 to 2009 for IBI SB, MAA SB and DDC SB respectively in a compact disc and in the form of photocopies, which stated *inter alia* the profit before tax ("PBT") and PAT.

The Third Representation:

(iv) *via* email dated 17 December 2010 which enclosed "the budget" for IBI SB and DDC SB respectively for 2011;

(v) *via* email dated 21 December 2010 which *inter alia* enclosed "the detailed 2011 budget" for MAA SB; and

(vi) the plaintiff had used the projected PBT and PAT for 2011 to benchmark the performance of the companies against their competitors.

The Fourth Representation:

(vii) *via* e-mail dated 28 December 2010 together with attachment which *inter alia* stated:

(a) the PBT and PAT for IBI SB, MAA SB and DDC SB for 2008, 2009 and 2010; and

(b) the comparisons between the PBT and PAT of the said companies and the PBT and PAT of their competitors for the period from 2007 to 2009;

(viii) *via* e-mail dated 10 January 2011 at 12:27pm together with attachment entitled "five years forecast P & L for the three Malaysian companies" ie, for IBI SB, MAA SB and DDC SB, for the period from 2011 to 2015; and

(ix) *Via* e-mail dated 10 January 2011 at 5:57pm together with attachment entitled "five years cashflow forecast for all three companies" ie, for IBI SB, MAA SB and DDC SB, which reaffirmed the representations made through the emails dated 28 December 2010 and 10 January 2011 at 12:27pm respectively.

The Employment Contract And The Service Agreement

[6] Relying on the representations, he entered into employment contract dated 10 January 2011 ("employment contract").

[7] In 2013, the plaintiff claimed that the first defendant and his wife had suggested for the manner of payment of the salary to the plaintiff be regularised. This led to the plaintiff to enter into a separate service agreement dated 1 January 2013 ("service agreement")

[8] The plaintiff claimed that he then discovered the four representations to be fraudulent. This came to his knowledge as from or about 21 April 2011 during the course of internal meetings.

The Plaintiff's Claim For The Defendants' Fundamental Or Repudiatory Breach Of Contract

[9] The plaintiff contended that the first defendant's letter dated 22 July 2015 and second defendant's letter dated 20 August 2015 (termination letters) which gave rise to him being removed as CEO had constituted either fundamental or repudiatory breaches of the employment contract and the service agreement.

The Third To Tenth Defendants' (The Non-Privy Defendants) Application - Enclosure 28

[10] Enclosure 28 contains the following prayers:

(i) A determination of the following issues/questions:

(a) whether the statement of claim ("SOC") disclose any valid cause of action against the non-privy defendants? ("question 1");

(b) whether the plaintiff has pleaded the necessary elements in the SOC to make out a cause of action for fraudulent trading under s. 304(1) of the Companies Act 1965 (now s. 540(1) of the Companies Act 2016) ("fraudulent trading") against the non-privy defendants? ("question 2");

(c) whether there exists any privity of contract between the plaintiff and the non-privy defendants? ("question 3");

(d) whether there is any actionable misrepresentation made by the non-privy defendants as pleaded by the plaintiff? ("question 4");

(e) whether the plaintiff's alleged cause of action for "misrepresentation" is barred by limitation? ("question 5");

(f) whether the plaintiff's claim is estopped by reason of his acquiescence and/or by reason of laches on his part? ("question 6"); and

(g) whether the application of the *ex turpi causa non actio oritur* principle would operate to disentitle or estop the plaintiff from seeking any relief against the non-privy defendants for fraudulent trading? ("question 7").

(Collectively referred to as "questions").

(ii) In the event question 1, question 2, question 3 and/or question 4 are answered in the negative or where question 5, question 6 and/or question 7 are answered in the affirmative, an order that the plaintiff's action herein be dismissed against the non-privy defendants.

(iii) All necessary directions be given for the determination of the issues (including any other questions or issues as may be reasonably required to be determined) for the just, expeditious and economical determination of this application and this action.

(iv) Suitable provision be made for the costs of this application and cost of the action.

(v) Such further or other relief that is deemed fit and just by this Honourable Court.

[11] The third to tenth defendants also described as the non-privy defendants contended that the filing of encl. 28 is premised on the established principle that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 2 rather than going under O. 18 r. 19 of the ROC 2012.

[12] In resisting the said application, the plaintiff raised a preliminary objection. The plaintiff submitted that encl. 28 is but a procedural manoeuvre to delay the trial of the action as long as possible and is an abuse of the process of the court. It is therefore oppressive or improper or unreasonable, and ought to be dismissed with costs on indemnity basis and to be paid forthwith. The present case is not suitable for disposal under O. 33 even on the merits of encl. 28.

[13] The third to tenth defendants argued that the application is correctly brought under O. 33 r. 5 to order a dismissal of the action depending on the determination of the questions and issues posed.

[14] This court will now examine the arguments proffered by both parties in this application.

Preliminary Objection

[15] It is perhaps best to reproduce the preliminary objection of the plaintiff by reproducing counsel's submission as contained in encl. 43. It reads:

> 7. In determining whether an application under O. 33 r. 2 of the ROC 2012 [TAB 1] ought to be allowed, such as encl. 28, with respect, your lordship must first be satisfied that:
>
> (a) There are specific issues of fact and/or law – by the pleadings or otherwise – which ought "to be tried before, at or after the trial" of

A the present action (see *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 MLJ 474 (SC) at page 475 [TAB 2], and Malaysian Civil Procedure (2015), Volume 1 at pages 444 and 446 [TAB 3]), and

(b) A decision on the said issues of fact and/or law – when so tried separately – shall "substantially [dispose]" the present action, or "renders the trial of the [present action] unnecessary" (see Order 33 rule 5 of the ROC 2012 [TAB 1], and Malaysian Civil Procedure (2015), Volume 1 at page 449 [TAB 3]).

8. Upon being satisfied with the matters stated in paragraph 7(a) and (b) above, your lordship shall "give directions as to the manner in which the question or issue shall be stated" (O. 33 r. 2 of the ROC 2012 [TAB A], *Petroleum Nasional Bhd & Anor v. Kerajaan Negeri Terengganu* [2004] 1 MLJ 8 (CA) at page 28 [TAB 4], and Malaysian Civil Procedure (2015), Volume 1 at page 444 [TAB 3]). That is to say, whether the issues of fact and/or law ought to be tried summarily or otherwise.

9. That is all that encl. 28 can apply for. It goes without saying that the power to "dismiss the [present action] or make such other order or give such judgment therein as may be just" can only be exercised after the specific issues of fact and/or law are tried separately as stated in paragraph 8 above. Not upon disposal of encl. 28.

[16] The plaintiff closed his submission by arguing that encl. 28 ought to be dismissed by this court as it is:

(i) outside the purview of O. 33 rr. 2 and 5 of the ROC 2012;

(ii) scandalous, frivolous or vexatious;

(iii) an application which may prejudice, embarrass or delay the fair trial of the present action; or

(iv) otherwise an abuse of process of the court.

[17] The third to tenth defendants however, argued that the preliminary objection ought to be dismissed. If at all there is two-stages process in construing O. 33 r. 2, they involve a consideration of:

(i) whether the questions posed are suitable for determination for the disposal of the plaintiff's claim without a full trial and/or, will result in a substantial saving of time and expenditure ("stage 1"); and

(ii) the merits of each question posed and affording the parties an opportunity to be heard ("stage 2").

[18] There would be no need to consider stage 2 if the threshold at stage 1 is not met.

Analysis

[19] The plaintiff relied on a passage in the then Supreme Court decision in *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321; [1991] 3 MLJ 474 ("*Newacres*") to support his contention that there must be a formal application to determine the question or issue before the court can go on to consider O. 33 r. 2. The court held:

> Rule 2 gives the court discretionary power to order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, to be tried before, at or after the trial of the cause or matter and may give directions as to the manner in which a question or issue shall be stated. *If learned counsel for the appellant relied on O 33 r 2, in the first place, there should be an application for an Order under r 2 and if the court allows the application, then the court may give direction as to the manner in which the question or issue shall be stated*. From the notes of proceedings, there was no evidence of such application under r. 2 and no order expressly given and no directions as to the manner in which the question or issue is to be stated. (emphasis added)

[20] Counsel for the plaintiff relied on the Supreme Court's observation that "... in the first place, there should be an application for an order under r. 2 and if the court allows the application, then the court may give direction as to the manner in which the question or issue shall be stated".

[21] It must be emphasised, *Newacres* was decided on a set of facts that was peculiar to itself. The Supreme Court remarked that there were "disturbing features" in the manner the matter proceeded at the High Court. The Supreme Court was dealing with a scenario where it was uncertain if the High Court was in fact considering an application under O. 18 r. 19 or O. 33 r. 2. This can be seen from the passage at p. 326 (CLJ); p. 475 (MLJ) of the decision where it was held:

> For the sake of convenience, the term 'appellant' is used as a reference to the defendant and the term 'respondent' to the plaintiff in Originating Summons No C189/85. Before us, learned counsel for the appellant who also appeared for the appellant in the court below, advanced the same two grounds to support his arguments that this appeal should be allowed. He complained that the learned judge was wrong in dismissing his objections, purporting to act under O. 18 r. 19 of the Rules of the High Court 1980 because of the delay on the part of the appellant in making the application to strike out the suit. It would appear from the judgment that the learned judge in fact decided that under O. 18 r. 19 the application should be made as early as possible and should not be made at a very late stage, particularly at a stage when the case was ready for trial. In this respect, we would point out that the learned judge was led to believe that the application to dismiss the suit was indeed made under O. 18 r. 19 because learned counsel himself in his submissions before the learned judge apparently relied on O. 18 r. 19 and on the ground that the cause of action was vexatious and frivolous. The notes of proceedings in the High Court

provide evidence that O. 18 r. 19 was cited by learned counsel for the appellant. *There was no indication from the notes of proceedings that the appellant's application was not made under O. 18 r. 19 and it made no reference at all to O 33 r 2. We are all familiar with O. 18 r. 19 and O. 33 r. 2 which do not deal with the same subject matter. If there is any assistance at all that could be obtained from the notes of proceedings in the lower court on this aspect of the case it is to be found on p. 77 in Vol I of the record of appeal where learned counsel for the respondent in his reply adverted to O. 33 r. 2 as being discretionary, perhaps with some innate perspicacity, he concluded that the appellant's case was one under O. 33 r. 2.* (emphasis added)

[22] Upon analysing the factual background of the case and how the matter proceeded at the High Court, the Supreme Court deduced that the application was in fact under O. 33 r. 2. It is in this context that the *Newacres* must be appreciated. It was not a case where there was an express *dicta* of the two tier process as suggested by the plaintiff. A *fortiori*, O. 33 r. 2 does not mention of any two-tier approach.

[23] The plaintiff also relied on the decision of the High Court in *Chendeladevan Kuppusamy v. Majlis Bandaraya Pulau Pinang* [2021] 1 LNS 50; [2021] MLJU 103. With respect, again, the context in which the High Court determined the appeal must be seen from the factual matrix of how the matter was disposed of at the Sessions Court. The court did not in any manner require two separate hearings in determining an O. 33 r. 2 application.

[24] The plaintiff postulates that an application in encl. 28 made under O. 33 r. 2 is akin to a procedural provision. That encl. 28 can only apply for this court to "give directions as to the manner in which the question or issue shall be stated". The power to "dismiss the [present action] or make such other order or give such judgment therein as may be just" can only be exercised after the specific issues of fact and/or law are tried separately. Not upon disposal of encl. 28. (See above para. 7(a), (b) and 8 of the plaintiff's submissions as reproduced at para. 15 of this grounds of decision)

[25] This court does not subscribe to the postulation advanced by the plaintiff.

[26] It is the view of this court that when the application before the court states that there are questions or issues arising in a cause or matter, whether of fact or law or partly of fact and partly of law, the court may give directions as to the manner in which the question or the issue shall be stated. In other words, the court may get involved in how the question or issue is to be framed or formulated, if it chooses to do so.

[27] It is undisputed that the wordings employed in O. 33 r. 2 by itself imply that it is fully within the court's discretion whether or not any directions are to be given and it is by no means mandatory. This view is consistent with the observations in *Newacres*.

[28] If the court does not wish to give any directions as to the manner in which the issue or question is to be stated, it must necessarily mean that the court is satisfied with what is available before the court.

[29] The court will then go on to consider the application based on the question or issue formulated. The objective is to determine if the question substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary. The court may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

[30] It is the view of this court that that the notion of a two-tier process is illusory. It is in facts, one seamless process which can be dealt with concomitantly, subject to the court being satisfied with the question or issue it is required to determine. The determinative factor is whether there is a question or issue before the court.

[31] In the present case, this court is satisfied with the seven questions posed by the third to tenth defendants. This court does not wish to give any further directions and accepts the questions as formulated by the third to tenth defendants.

[32] This court agrees with the submissions of the third to tenth defendants that encl. 28 is premised on the established principle that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 2 rather than going under O. 18 r. 19.

[33] This proposition is backed by the Federal Court in *Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 CLJ 1; [2016] 3 MLJ 1 citing *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36 with approval:

> [26] The tests for striking out application under O. 18 r. 19 of the ROC, as adopted by the Supreme Court in *Bandar Builder* are, *inter alia*, as follows:
>
> (d) **if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 of the ROC**; and (emphasis added)

[34] That was precisely what the third to tenth defendants sought to do.

Ruling On The Preliminary Objection

[35] This court finds the objection raised by the plaintiff is unsupported in law. Order 33 itself does not dictate any procedural requirement let alone any two-stage process. It is purely an enabling provision, allowing the court the discretion to deal with the preliminary issue, depending on the nature of the case.

[36] In the current case, at the risk of repeating, the questions posed did not require any further intervention or direction by this court. They were valid questions which this court can determine based on the parameters set out under O. 33 of the ROC 2012. Enclosure 28, was validly laid before this court and the prayers therein are open for this court to grant.

[37] The preliminary objection is therefore dismissed.

Application Under Order 33 Rule 2

[38] For ease of reference, O. 33 is reproduced below:

Mode of Trial

Mode of trial (O. 33 r. 1)

1. Subject to the provisions of these Rules, a cause or matter, or any question or issue arising therein, may be tried before a Judge or Registrar, with or without the assistance of assessors.

Time of trial of questions or issues (O. 33 r. 2)

2. The court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

3. Determining mode of trial (O. 33 r. 3)

(1) In every action begun by writ, an order made at the pre-trial case management shall determine the mode of trial; and any such order may be varied by a subsequent order of the court made at or before the trial.

(2) In any such action, different questions or issues may be ordered to be tried by different modes of trial and one or more questions or issues may be ordered to be tried before the others.

4. Trial with assistance of assessors (O. 33 r. 4)

(1) A trial of a cause or matter with the assistance of assessors shall take place in such manner and on such terms as the court may direct.

(2) The assessor shall assist the court in dealing with a matter in which the assessor has skill and experience.

(3) An assessor shall take such part in the proceedings as the court may direct.

(4) The court will, not less than fourteen days before appointing an assessor, notify each party in writing of the name of the proposed assessor and of the qualifications of the assessor.

(5) Where any person has been proposed for appointment as an assessor, any objection against him, either personally or in respect of his qualification, may be taken by any party.

(6) Any such objection shall be made in writing and filed with the court within seven days of receipt of the notification referred to in paragraph (4) and shall be taken into account by the court in deciding whether or not to make the appointment.

(7) The remuneration to be paid to the assessor for his services shall be determined by the court, and shall form part of the costs of the proceedings.

(8) The court may order any party to deposit into court a specified sum in respect of the assessor's fees and, where it does so, the assessor will not be asked to act until the sum has been deposited.

(9) Paragraphs (7) and (8) shall have no application where the remuneration of the assessor is to be paid out of moneys provided by Parliament..

5. Dismissal of action after decision of preliminary issue (O. 33 r. 5)

If it appears to the court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

[39] An application either under O. 33 r. 2 when read together with r. 5 or O. 18 r. 19 may lead to drastic outcomes. Foremost, it may result in the claim against potential defendants to be struck out. While the outcome may be similar, the two provisions of the ROC 2012 do not deal with the same subject matter.

Applicable Principles

[40] Guidance can be taken from the Court of Appeal decision of *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337; [2004] 1 MLJ 8 at paras. 16 and 17 where the Court of Appeal outlined the applicable principles of O. 33 r. 2. It held:

> [16] Order 33 r. 2 of the RHC states that the court may order any question or issue arising in any cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated. The Federal Court in *Palaniappa Chettiar v. Sithabaram Chettiar & Ors* [1982] 1 MLJ 186 agreed with the learned judge in holding that it would be convenient to try the preliminary issue, as if the contention of the respondents was upheld, that could conclude the whole proceedings and it would be unnecessary to try the other issues. In *SI Rajah & Anor v. Dato' Mak Ron Kam & Ors* [1993] 3 MLJ 741, Lim Beng

A Choon J, after considering a large number of authorities on the ambit of O. 33 r. 2 and its equivalent, stated that before deciding to allow the preliminary questions to be raised, the court must bear in mind the following observations:

(a) as a general rule, the court will exercise its power under O. 33 r. 2 B if and only if the trial of the question will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go to trial as a whole;

(b) an order under the said rule should not be made in respect of matters which by reason of the obscurity either of the facts or the law ought to be decided at the trial of the suit; C

(c) preliminary points of law have been described as too often of so-called issues of fact, the justification is even harder to discern;

(d) preliminary question should be carefully and precisely framed so as to avoid difficulties of interpretation as to what is the real question D which is being ordered to be tried as a preliminary issue.

[41] *Newacres*, which was discussed earlier, provides guidance on many aspect of the applicability of O. 33 r. 2. One of the principles highlighted by the plaintiff is that if there are extrinsic evidence required to be considered, O. 33 r. 2 is unsuitable.

E **[42]** The Supreme Court in *Newacres* also provided valuable guidance in respect of the difference between a striking out application under O. 18 r. 19 and an O. 33 r. 2 application. According to the court, both do not deal with the same subject matter. It went on to expound:

F Two courses are open to the appellant who wishes to raise the question whether, assuming a statement of claim to be proved, it entitles the respondent to relief. *One method is to raise the question of law as directed by O. 33 r. 2 read together with O. 18 r. 11 and the other is to apply to strike out the statement of claim under O. 18 r. 19. The first method is appropriate to cases requiring argument and careful consideration. The second and more summary* G *procedure is only appropriate to cases which are plain and obvious, so that a judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the respondent to what he asks. (See Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd [1899] 1 QB 86 per Lindley MR at p. 91.)* We would therefore consider this appeal and make our decision on the basis that this is an application for the trial of preliminary issues before the trial itself. H We would interpolate to say that O 33 r 2 is suitable if there is a point of law which, if decided in one way, is going to be decisive of litigation and the advantage should be taken of these facilities. (See *Everett v. Ribbands & Anor* [1952] 2 QB 198 at p 206 per Romer LJ).

(emphasis added)

I **[43]** The court went on to rule that O. 33 r. 2 is suitable if there is a fact or law which, if decided in one way is going to be decisive of the litigation.

[44] An action may involve many disputes on the facts as well as on the law; some more complex than others. It may be that the determination of a preliminary point in one way may make it unnecessary for other more complex issues of fact or law to be decided, thus resulting in a saving of time and expense of a protracted trial on those issues. This is what O. 33 r. 2 when read together with r. 5 allows the court to do.

[45] The Supreme Court in *Newacres* described O. 33 r. 2 as a facility that should be taken advantage of if it can decisively decide litigation. The court held:

> ... We would therefore consider this appeal and make our decision on the basis that this is an application for the trial of preliminary issues before the trial itself. We would interpolate to say that O. 33 r. 2 is suitable if there is a point of law which, **if decided in one way, is going to be decisive of litigation and the advantage should be taken of these facilities**. (See *Everett v. Ribbands & Anor* [1952] 2 QB 198 at p 206 per Romer LJ).
>
> (emphasis added)

The Application In Enclosure 28

[46] It is the view of this court that the outcome of this application can be determined on the first four questions posed by the third to tenth defendants namely:

(i) whether the SOC discloses any valid cause of action against the non-privy defendants? ("question 1");

(ii) whether Azhar has pleaded the necessary elements in the SOC to make out a cause of action for fraudulent trading? ("question 2");

(iii) whether there exists any privity of contract between Azhar and the non-privy defendants? ("question 3"); and

(iv) whether there is any actionable misrepresentation made by the non-privy defendants as pleaded by the plaintiff? ("question 4").

[47] While the plaintiff argued that these questions would invariably invite the court to consider the facts of the case and involve intrinsic evidence, a careful examination of the questions would show that they are questions that revolve on pure issues of law.

[48] The third to tenth defendants cannot be faulted to intersperse the factual background of the claim into their arguments as without referring to the facts, the questions would be considered in vacuum and the context of the questions and arguments to support the application is lost.

[49] The third to tenth defendants contended that there is no requirement for any factual contest between what has been pleaded in the SOC and the defence. As such the third to tenth defendants do not wish to refer to the defence filed. The considerations are solely on the examination of the plaintiff's pleaded case.

A **[50]** As stated by the Supreme Court in *Newacres*, an O. 33 r. 2 application is appropriate to cases requiring argument and careful consideration. This is in contrast to an O. 18 r. 19 application where a more summary procedure is applied to and is only appropriate to cases which are plain and obvious, so that a judge can say at once that the statement of claim as it stands is
B insufficient, even if proved, to entitle the respondent to what he asks.

[51] In determining encl. 28, the plaintiff's pleaded case must be tested with careful consideration against the relevant principles of law referred by the third to tenth defendants to prove their challenge. It is this exercise that this court finds to be most critical.

C

An Overview Of The Plaintiff's Case

[52] It is important to get to the fundamentals and evaluate the plaintiff's case and in doing so, it is incumbent on this court to determine whether the factual dispute as contended by the plaintiff renders the application
D unsuitable.

[53] It bears emphasis that the dispute must be triable in the sense that they must exist in the context of a valid and enforceable claim. Of importance, the evaluation of arguments must be in the context of a case being made against the third to tenth defendants.

E

[54] The pleaded case of the plaintiff is anchored on the following causes of action:

(i) breach of contract; and

(ii) fraudulent trading

F

[55] The claim is founded on the plaintiff's rights and entitlements under the employment contract and service agreement which he claims to have been wrongfully deprived of.

[56] The plaintiff claims that because of his expertise as a "turnaround
G artist", the first defendant invited him to be his "partner" and various discussions ensued. In the course of the discussions, four representations were made with respect to the financial results and financial projections of various companies associated with the first defendant ("financials"). The representations spanning 27 pages, were outlined by the plaintiff at Part C
H of the SOC. They included excerpts of the audited financial statements of the companies within the group.

[57] The plaintiff alleged that the representations were fraudulent in that the audited financial statements were manipulated and falsified. In so far as the representations were concerned, the plaintiff pleaded that the
I representations on the financials induced him to enter the employment contract and he relied on them in agreeing to the target. In this regard, the plaintiff pleaded that he would not have entered into the employment contract but for the misrepresentations of the financials ("misrepresentations").

[58] For context, at para. 36 of the SOC he pleads as follows: A

> 36. Had Azhar known that the first representation, the second representation, the third representation, the fourth representation, the fifth representation and the sixth representation were fraudulently made, and the figures were materially and significantly at variance with the reality as explained in paragraphs 48 to 90 below, Azhar would never have B entered into the employment contract on 10.01.2011.

[59] It was pleaded by the plaintiff that upon him joining the group, the plaintiff then found that the financials of the third to tenth defendants were not as what it was represented to him. The plaintiff pleaded, earliest that he could have discovered was 21 April 2011. C

[60] The plaintiff claims that the target that were set by the first defendant was the mandate for him to execute under the employment contract. The said target was incorporated at cl. 5 of the employment contract where it was stated that "Other than your key performance index (KPI) that shall be agreed upon annually, your goal is to achieve a quadrupling the total sum of D the audited profit before tax (PBT) of all the companies in 2010 at the fifth year of your tenure as a group CEO". The plaintiff pleaded that as a result of the said misrepresentation (on the actual state of the financials), he was unable to perform and meet the target. On this point, the plaintiff in his SOC pleaded at para. 93 that: E

> In light of the true state of affairs of the companies which was discovered by Azhar subsequent to the employment contracts stated in paragraphs 50 to 91 above, and which was well within Dato' Muthukumar's knowledge but hidden from Azahar it was conceptually untenable to turn around the relevant companies from loss-making to entities with heavy accumulated F losses to quadruple PBT. The companies were in reality financially insolvent and in dire need of working capital to stay afloat and survive. Hence one cannot quadruple from nothing or, negative figures. In consequence thereof, Azhar's purported obligation in Clause 5 of the employment contract to quadruple audited PBT was therefore to do an impossible thing pursuant s. 57 of the Contracts Act 1950. It is null and G void.

[61] The plaintiff however, claimed that he had actually performed his part of the bargain. However, it was not by him meeting the target set (namely to turnaround the companies and quadruple the PBT) but by making the MK Group of companies "less loss-making". At para. 94 it was pleaded by the H plaintiff that at best "his obligation would only be to turn around the companies from loss-making or, breakeven point or, any amount of profit-making".

[62] He claimed that he was then wrongfully terminated from his position by virtue of the first defendant's letter dated 22 July 2015 and MK Tron's I letter dated 20 August 2015. He thus claimed that he was entitled to all the benefits outlined under the employment contract.

[63] It is based on these facts that the court considered the questions posed by the third to tenth defendants.

Analysis Of The Questions

The Questions:

Question 1 – Whether There Is No Cause Of Action Raised Against The Third To Tenth Defendants As A Result Of The Purported Misrepresentation And Breach Of Contract

[64] This court agrees with counsel for the third to tenth defendants that there seems to be an approbation and reprobation on the part of the plaintiff. It is clear to the mind of this court that based on paras. 36 and 48 of his SOC, the plaintiff pleaded misrepresentation. Misrepresentation affects the free consent necessary to form a contract. The effect is to render the contract voidable. The option is on the plaintiff as to whether to treat the contract as valid or rescind it. However, despite the plaintiff claiming that he got to know about the falsity of the financial standing of the group of companies as early as 21 April 2011, he did nothing until his termination in 2015.

[65] This can only mean that the plaintiff did not find the alleged misrepresentations objectionable then.

[66] However, more than four years after his termination, the plaintiff sought to argue that there was misrepresentation, but he is not seeking a remedy under misrepresentation but one under a breach of contract. The misrepresentation was the foundation that he laid his claim for a cause of action under a breach of contract.

[67] To the mind of this court, the plaintiff has clearly elected to affirm the employment contract as he did not choose to rescind the same. However, he now wishes to resurrect the misrepresentation made against him as the foundation of his breach of contract claim. This to the mind of this court is where the plaintiff fails in resisting the third to tenth defendants' application.

[68] The plaintiff cannot now find a case for damages for breach of contract on allegations that are anchored on misrepresentations. The issue of lack of free consent is spent. He is estopped by way of conduct from raising misrepresentation once he affirms the contract. This is where he is approbating and reprobating.

[69] It is clear that the plaintiff had taken benefit from the course of conduct that he pursued while under the employment contract but now takes an inconsistent stand to his earlier position. This court finds support on this point by the instructive decision of the Court of Appeal in *Konsortium Lebuhraya Utara-Timur (KL) Sdn Bhd v. Liew Choong Kin* [2018] 6 CLJ 217 at paras. 25 and 26 where the court held:

[25] Based on the above actual facts, *the respondent could be said to be taking a different stance before the court in this action and under the law he was not allowed to blow hot and cold in the attitude that he adopts*. The learned judge failed to consider that the respondent's claim for trespass and the claim he had already made at the second enquiry arose from the same facts. He should accordingly be estopped from commencing this action. The respondent having made a choice at the second enquiry could be treated as having made an election from which position he should not be allowed to abandon. *He had taken a benefit arising out of the course of conduct which he had pursued earlier and with which his subsequent conduct was inconsistent with his election. The respondent should not be at liberty to approbate and reprobate having taken a particular position*.

[26] ... *In our judgment, the respondent, as we have indicated above, had chosen his own course of action, he subsequently therefore is precluded from pursuing the other course of action attracting in consequence the application of the legal principle that does not permit a person to both approbate and reprobate*. (emphasis added)

[70] This court finds that the plaintiff by his own conduct is a probating and reprobating, contrary to settled principles of law.

[71] It is trite law that a breach of contract would entitle the innocent party to bring the contract to an end and claim damages. This is provided so in s. 40 of the Contracts Act 1950.

[72] This court is persuaded by the submissions of the third to tenth defendants that damages must be in relation to and flow from the breach ie, after the contract is formed. It cannot be rooted in the alleged misrepresentations prior to the contract being formed. The plaintiff is not entitled to be awarded damages both for misrepresentation and breach of contract.

[73] This is consistent with the Court of Appeal decision in *Bounty Dynamics Sdn Bhd v. Chow Tat Ming & Ors* [2015] 9 CLJ 422; [2016] 1 MLJ 507 where it was held:

[50] We found that, in connection with the order on damages to be assessed granted by the learned JC, there were elements of duplicity. A plaintiff must in law decide whether he is pursuing a claim on misrepresentation or breach of contract. *He is not entitled to be awarded damages both for misrepresentation and breach of contract. Once a representation becomes a clause in the contract, such as argued here by the respondents, there could not therefore be an order for damages to be assessed for both misrepresentation and breach of contract*. (emphasis added)

[74] In *Low Keang Guan v. Sin Heap Lee-Marubeni Sdn Bhd* [2005] 1 LNS 289; [2005] 7 MLJ 216 Abdul Malik Ishak J (as he then was) succinctly explained that the cause of action and the remedies for misrepresentation and breach of contract are entirely different. His Lordship held:

18. I must categorically state **that the cause of action and the remedies for misrepresentation and the breach of a contract are entirely different**. The cause of action, in the case of non-compliance with a term, is that of a

A breach of contract and the remedy is for damages. But where the representation remains a representation then the contract is said to be voidable in that it remains valid until and unless rescinded by the innocent party...

21. It is apt to mention that the plaintiff has not pleaded his claim in the alternative. *Instead the plaintiff has lumped both the breach of a term and misrepresentation together as if the plaintiff was entitled to obtain the relief in respect of both claims. I must hold and it was part and parcel of my judgment that the plaintiff's pleading was wholly embarrassing*.

(emphasis added)

C **[75]** There is clearly a lumping of the causes of action by the plaintiff. This did not assist the plaintiff in defending their position.

Representations Not Actionable

[76] It is also the finding of this court that the representations that the D plaintiff claimed to have induced him to enter the employment contract are not actionable representations. This is because they were largely based on audited financial statements which have been audited and approved by auditors. This court in the Kuala Lumpur Originating Summons No: WA-24NCC-392-08-2018 – *Dato' Seri Timor Shah Rafiq v. Nautilus Tug & Towage Sdn Bhd* E had made observations on the extent one should be able to challenge and dispute audited financial statements. This court held that:

The audited accounts of the defendant

[42] The plaintiff questioned the accuracy of the audited financial statements of the defendant. The defendant defended their position F against Crowe Horwath Reports by highlighting that the audited yearly financial statements were audited by three (3) external auditors:

(a) Messrs. SCS Global & Co - for financial statements year ending 2013, 2014, 2015 and 2016;

(b) Messrs. BDO - for financial statements (draft) for year ending 2017;

G

(c) Messrs. UHY - for financial statements for year ending 2017 and 2018.

[48] The finding of three (3) separate auditors demolishes any reason for this court to enquire further or entertain the complaint of the plaintiff. The plaintiff is now disowning the very accounts that the Board which the H plaintiff is a member of had collectively agreed in the directors' declaration that declared the true and fair view position of the defendant's accounts. This means that the financial statements are free from material misstatements and faithfully represent the financial performance and position of the defendant.

I

> [49] Therefore, an attempt to challenge the accounts of the defendant after it has been officially released is an afterthought on the part of the plaintiff. There is no basis to question or doubt the audited financial statements in the manner complained by the plaintiff.

[77] It is factually correct to observe that the plaintiff did nothing to apply for any restatement of the accounts and neither did he call for a new audit exercise to be undertaken then.

[78] The plaintiff also pleaded by reason of the misrepresentations, the obligation on the plaintiff to achieve the target had been frustrated.

[79] Frustration of contracts refers to a particular way in which contractual obligations can be discharged. A contract is frustrated where further performance of the contract becomes impossible due to an unforeseen event, or series of events, taking place through no fault of the parties to the agreement. In these circumstances, the parties' contractual obligations are automatically discharged, and subsequently, neither party can demand further performance of the contract by the other party. (*Taylor v. Caldwell* (1863) 3 B & S 826; 122 ER 309). in short the legal effect of frustration is to excuse further obligations under the entire contract.

[80] It cannot be any change in circumstances would result in frustration of a contract. It must be fundamental enough to transmute an obligation which the contract did not contemplate and to which it could not apply. (*Parkinson (Sir Lindsay) & Co Ltd v. Commissioner of Works* [1949] 2 KB 632).

[81] The Federal Court in *Ramli Zakaria & Ors v. The Government Of Malaysia* [1983] 1 CLJ 73; [1983] CLJ (Rep) 350; [1982] 2 MLJ 262 held:

> In short it would appear that where after a contract has been entered into there is a change of circumstances *but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the performance of the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration*.
>
> (emphasis added)

[82] The plaintiff on the other hand pleaded that it only operates so as to invalidate his obligation to meet the target. The plaintiff argued that the contract subsists but for a lesser obligation due from him. As such when the termination letters were served on him, it resulted in repudiatory breaches of contract giving rise to damages. This is legally unsustainable as what the plaintiff seeks to do is to carve out the effect of frustration to suit his pleaded case.

[83] It is also pertinent to note that the representations were not in fact directly made by the third to tenth defendants themselves. Rather the allegation is that Subramaniam Sundram the Chief Finance Officer of the MK Group made the representations on behalf of the first defendant and the third to tenth defendants.

[84] In *Newacres*, the Supreme Court demonstrated the meaning of cause of action by making reference to several decided cases. It held:

> Perhaps, it would be enlightening if we say a few words on the meaning of the term 'cause of action'. In *Cooke v. Gill* (1872-73) 8 LR CP 107, Bovill CJ at p. 116 defines 'cause of action' as follows:
>
> > Cause of action has been held from the earliest times to mean every fact which is material to be proved to entitle the plaintiff to succeed – every fact which the defendant would have a right to traverse.
>
> In *Read v. Brown* (1889) 22 QBD 128 at p. 131 Lord Esher MR has this to say on the real meaning of the phrase 'cause of action':
>
> > ... it has been defined in *Cooke v. Gill* LR 8 CP 107 to be this: every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.
>
> The modern definition of 'cause of action' is, as stated in *Letang v. Cooper* [1965] 1 QB 232 at pp. 242-243 per Diplock LJ, simply a factual situation the existence of which entitles a person to obtain from the court a remedy against another person.

[85] The Court of Appeal decision of *Pemilik-Pemilik Dan/Atau Pencarter-Pencarter Demis Tongkang Atau Vesel "Wantas 17" v. Pemilik-Pemilik Kapal Atau Vesel "My Ferry 2"* [2021] 1 LNS 666; [2021] MLJU 738 had also recently discussed what amounts to a cause of action. The court held as follows:

> [43] It is apposite to define the phrase "cause of action". It means 'simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person': per Diplock LJ in *Letang v. Cooper* [1964] 2 All ER 929 at p 934. See also *Lim Kean v. Choo Koon* [1970] 1 MLJ 158, *Nasri v. Mesah* [1971] 1 MLJ 32 (FC), *Saw Gaik Beow v. Cheong Yew Weng & Ors* [1989] 3 MLJ 301, *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 MLJ 474 (SC), and *Credit Corporation (M) Bhd v. Fong Tak Sin* [1991] 1 MLJ 409 (SC), as found in Malaysian Court Practice 2007 Desk Ed LexisNexis at p. 144.

[86] This court is of the view that no cause of action can be founded against the third to tenth defendants as a result of the purported misrepresentation and breach of contract. As such, this court finds the question 1 is to be answered in the negative.

Question 2: Whether Azhar Has Pleaded The Necessary Elements In The SOC To Make Out A Cause Of Action For Fraudulent Trading?

[87] The issue is whether the plaintiff has on the facts, established a cause of action against the third to tenth defendants for fraudulent trading.

[88] It perhaps necessary to reproduce the pleaded case of the plaintiff on his claim that there was fraudulent trading by the third to tenth defendants. At para. 164(g):

> 164(g): Alternatively, a declaration pursuant to section 304(1) of the Companies Act 1965, that the defendants have been knowingly a party to the carrying on of the businesses of the second to tenth defendants with intent to defraud the plaintiff and thus, the first defendant shall also be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the companies

[89] It is crucial to note that the plaintiff seeks the court to make a declaration that fraudulent trading had been carried out by the third to tenth defendants (the defendants in current application) specifically with the intent to defraud the plaintiff.

[90] It is the finding of this court that the plaintiff has failed to plead how each of the defendants carried out their respective business so as to defraud the plaintiff or for a fraudulent purpose. Nothing is found in the SOC to allow this court to ascertain the factual manner in which such fraudulent trading was carried out.

[91] It insufficient for the plaintiff to merely quote the provision of a statute (in the current case s. 540 of the Companies Act 2016) and not plead the elements of that establishes the cause of action.

[92] The requirement to plead and prove a case of fraudulent trading was outlined by the Court of Appeal in *Tradewinds Properties Sdn Bhd v. Zulhkiple A Bakar & Ors* [2019] 2 CLJ 261; [2019] 1 MLJ 421 at para. 20 where the court held:

> [20] In broad terms, there are two elements to establishing an application under sub-s. 304(2) of the CA 1965. These are:
>
> (a) that the business of the company has been carried out 'with intent to defraud creditors ...' or for any fraudulent purpose; and
>
> (b) that the defendant who was knowingly a party to the carrying on of the business in that manner.

(see also *Spacious Glory Sdn Bhd v. Coconut Three Sdn Bhd* [2020] 1 LNS 1617).

[93] Thus it behooves the plaintiff to plead the elements of fraudulent trading namely:

(i) that the business of the third to tenth defendants had been carried out with intent to defraud the plaintiff; and

A (ii) that the third to tenth defendants were knowingly parties to the carrying out of the business in that manner.

[94] The law is settled in this area. An allegation of fraud must be pleaded with the highest degree of particularity. In a similar position to the instant case, the court in *Deepak Jaikishan Jaikishan Rewachand & Ors v. Dato' Seri Mohd Najib Tun Abdul Razak & Ors* [2020] 1 LNS 1008 in striking out a claim for conspiracy to defraud for *inter alia*, insufficient particulars held:

> [35] However, *without particulars of the overt acts committed by each of the defendants, the claim in conspiracy is unsustainable. The plaintiffs failed to plead sufficient or material particulars to establish the elements of the tort of conspiracy*. Instead, the plaintiffs mere resorted to using phrases such as 'on the instructions/direction/order of the defendants' or the 'defendants instructed/directed/ordered' to suggest a conspiracy between the defendants.
>
> (emphasis added)

[95] The Federal Court in *Dato' Prem Krishna Sahgal v. Muniandy Nadasan & Ors* [2017] 10 CLJ 385 held:

> [89] ... The statement of claim must with precision and detail, disclosed the plan or scheme used to defraud the creditors.

[96] This court is perplexed with the alternative claim by the plaintiff that he was defrauded by the third and fourth defendants as it occurred during his tenure as group CEO. He thus, cannot only now claim that the companies were operating in such a manner. This implies that he knew that the companies were carrying out fraudulent trading activities but chose not to act then. In effect, the companies were run by the plaintiff as the companies namely the third to tenth defendants are artificial soles. They are for all intents and purpose separate legal entities. However, the directing mind and operating hands of the companies are the plaintiff's. The line of the argument put up by the plaintiff against the third to tenth defendants does not withstand the test of establishing a case for fraudulent trading.

[97] The question is to be answered in the negative.

Question 3: Whether There Exists Any Privity Of Contract Between Azhar And The Non-Privy Defendants?

[98] The principle of privity of contract has been expounded in numerous law reports. Suffice to say privity of contract simply means that no one but the parties to a contract can be bound by it or entitled under it. (See *Boustead Naval Shipyard Sdn Bhd v. Dynaforce Corporation Sdn Bhd* [2014] 5 CLJ 533; [2015] 1 MLJ 284).

[99] The Court of Appeal in *Formis Resources Bhd & Ors v. Risk Management And Safety System Pty Ltd & Ors And Other Appeals* [2016] 9 CLJ 169 is instructive on the contractual legal liability of companies forming a group. The court held:

> The transactions and decisions of companies, though under one umbrella or group of companies remain the individual decisions of the particular company until and unless there are holdings out or representations, guarantees to the contrary. The shareholding of the company, be it by a single sole or by thousands of shareholders does not affect these principles. *There is no obligation in law for any one of the companies in the group, or for the holding company, to be liable for the obligations of another within the group. For that matter, there is no obligation for a subsidiary, no matter how substantively owned by a holding company, to be liable for the obligations of its holding company*.
>
> (emphasis added)

[100] Based on the SOC, it is clear to the mind of this court that the plaintiff anchored his claim to the benefits and entitlement under the employment contract and the service agreement. However, the third to tenth defendants are not parties to the agreements. By this token alone, there is an apparent disconnect when viewed from the privity angle. There is no link between the plaintiff and the third to tenth defendants.

[101] This court is persuaded by the argument by the third to tenth defendants that what the plaintiff seeks to do is to link the acts of the first defendant to the third to tenth defendants using the reversal of the *alter ego* doctrine. There is no requirement to do so as clearly, the directing hand and mind of the companies was the first defendant himself. What is being attempted by the plaintiff is in effect an imputation of privity into the third to tenth defendants when it cannot arise in the first place.

[102] As such, the question must be answered in the negative.

Question 4: Whether There Is Any Actionable Misrepresentation Made By The Non-Privy Defendants As Pleaded By Azhar?

[103] As can be seen in the SOC, the plaintiff has pleaded that there was misrepresentation made by the defendants. The said misrepresentations spanned over many paragraphs of the SOC. It baffles this court that despite the very clear words in the pleadings, the plaintiff maintains to say that he is not relying on misrepresentation in proving his case. Put it in another way, by his own admission, there is no actionable misrepresentation against the third to tenth defendants.

[104] Although the plaintiff insisted in no uncertain terms that he grounds his cause of action on a breach of contract, however, the manner he pleads the misrepresentations makes it inextricable to his pleaded case. It is in fact the foundation which forms the catalyst of his claim.

[105] The effect of the plaintiff disclaiming any reliance of misrepresentation simply means there is no actionable misrepresentation made out against the third to tenth defendants. The consequence of such a stand precludes the plaintiff from relying on the consequences of misrepresentation namely frustration. It also precludes him from relying on the contention that he is entitled to the substitution of the original target with the implied terms.

[106] Question 4, must be answered in the negative.

Questions 5, 6 And 7

[107] It is the view of this court that by answering the four questions in the negative is sufficient to allow this court to arrive at a finding that the third to tenth defendants should not be put to undue costs and expense to defend the plaintiff's claim.

[108] As such, there is no reason for this court to consider the remainder of the questions.

Whether This Application Is Consistent With The Intent Of Order 33 Rule 2

[109] This court is guided by the following *dicta* in the Court of Appeal decision of *Petroleum National Bhd* (*supra*) at paras. 35 and 37:

> [35] ... there should be no risk of injustice to the plaintiff if proper determination on those questions is made because *the applications are fought on the ground of the plaintiffs choosing, since it may generally be assumed to plead its best case* ... We are fortified in our view by what was held in *Federal Insurance Co v. Nakano Singapore (Pte) Ltd* [1992] 1 SLR 390 at pp. 394-395 (CA):
>
> > Thirdly we are in full agreement with counsel with respect to the powers of the court under O. 33 r. 2 of the RSC. That rule expressly provides that the court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law to be tried before at or after the trial of the cause or matter. It would be contrary to the express terms of that rule for a court to hold that it has no power to state a preliminary point even if it involves having to determine some issues of fact in order to determine the point of law. *An action may involve many disputes on the facts as well as on the law, some more complex than others. It may be that the determination of a preliminary point in one way may make it unnecessary for other more complex issues of fact or law to be decided, thus resulting in a saving of time and expense of a protracted trial on those issues.*
> >
> > (emphasis added)

[110] On the analysis carried out above, encl. 28 is decisive as far as the litigation against the third to tenth defendants is concerned. The plaintiff from his pleaded case has outlined a 129-page SOC. Although the plaintiff has pleaded his best case against the third to tenth defendants, when examined, they contain facts which do not reveal a cause of action against the third to tenth defendants.

[111] The determination of a preliminary point of law as formulated by the third to tenth defendants has allowed this court to make a decision that has a determinative effect which will result in a saving of time and expenses of a protracted trial.

Conclusion

[112] It is an appropriate case for this court to apply the provisions of O. 33 r. 2 read together with r. 5. The Supreme Court bench in *Newacres*, in their wisdom had labeled O. 33 as an option that "if decided in one way, is going to be decisive of litigation and the advantage should be taken of these facilities". This court fully appreciates the guidance and hereby applies it.

[113] Premised on the foregoing reasons, having considered the submission of the parties, the third to tenth defendants' application in encl. 28 is allowed. The cases against the third to tenth defendants are therefore dismissed.